AUG 8 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949.

No. 128.

EARLE C. ANTHONY, INC.,

Petitioner,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Respondents.

Reply to Respondents' Brief in Opposition to Petition For Writ of Certiorari.

EUGENE OVERTON,
EDWARD D. LYMAN,
733 Roosevelt Building, Los Angeles 14,
Attorneys for Petitioner.

OVERTON, LYMAN, PLUMB,
PRINCE & VERMILLE,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

I.

Reply to respondents' proposition that a privilege, not a right, is involved 1

II.

Reply to respondents' proposition that no federal question is involved 5

III.

Conclusion 7

TABLE OF AUTHORITIES CITED

CASES.

	PAGE
Bell v. Hood, 327 U. S. 678	6, 7
Burt v. City of New York, 156 F. 2d 791	6
Hayes v. Missouri, 120 U. S. 68	4
Love v. Chandler, 124 F. 2d 785	5
Missouri ex rel. Gaines v. Canada, 305 U. S. 337	3, 4
Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497	6
Truax v. Corrigan, 257 U. S. 312	3
United States v. Mozley, 238 U. S. 383, 59 L. Ed. 1355	5
Westminster School District of Orange County v. Mendez, 161 F. 2d 774	6

STATUTE

United States Constitution, Fourteenth Amendment	3

IN THE

Supreme Court of the United States

October Term, 1949.

No. 128.

EARLE C. ANTHONY, INC.,

Petitioner,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Respondents.

Reply to Respondents' Brief in Opposition to Petition For Writ of Certiorari.

I.

Reply to Respondents' Proposition That a Privilege, Not a Right Is Involved. (Resp. Br. pp. 3-4.)

Respondents' Brief takes issue with the Petition for Certiorari herein on only one question: Does the complaint (in this action) state facts which raise a Federal question?

The innuendo of respondents' restatement of that question is that respondent KVOE and KMPC had some prior and superior right to broadcast the news of the Overell Trial from the courtroom and this right was entitled to protection from Judge Morrison, even though that protec-

tion took the form of discrimination against a rival and competing broadcasting company.

It is submitted that we are not here concerned with whether broadcasting from a courtroom is *per se* a right or privilege. The question here is whether a State judge, acting under color of law, can dispense exclusive rights and privileges to a source of news to one news agency and deny those same rights and privileges to a competitor equally situated.

Petitioner's complaint clearly alleges it has been denied a right [R. 9, 10, 12]. That right is to carry on its business of broadcasting news without being discriminated against by State action [R. 7].

It is plain from the allegations of the complaint herein that petitioner and respondent KVOE were both radio broadcasting companies, earning their livelihood in the same manner and were serving the same general areas of the State of California, and that both were dependent upon their radio audiences for success [R. 4, 5]. The complaint also states that petitioner and respondent competed for that radio audience and that the acquisition of that radio audience depended on the type and quality of their news broadcasting [R. 4, 5]. The complaint alleges clearly that petitioner was wilfully, purposefully, intentionally and invidiously prohibited by a State official acting under color of law from broadcasting the verdict of the Overell Trial which had high news value, while its competitors were permitted by the same State official to broadcast that news [R. 6, 9].

There is no foundation whatever to respondents' statement (Resp. Br. p. 3) that the complaint fails to allege KFI reporters were excluded and that, in effect, petitioner's complaint is that it was not given "as convenient ac-

commodations" as its competitors. The fact is that *no* accommodations were afforded KFI, either in the courtroom, or immediately outside it, or by connection to the KVOE wire [R. 8]. Not only that, KFI's engineer and equipment were actually placed in restraint and seized [R. 8, 9].

The word "privilege" if applied to the right to broadcast does not limit the right to carry on a broadcasting business in a lawful manner without discrimination by State action. That right is guaranteed by the equal protection clause of the Fourteenth Amendment and substituting the word "privilege" for the word "right" does not lessen that protection, as the following illustrates:

Missouri ex rel Gaines v. Canada, 305 U. S. 337.

This was an action brought by a negro on the grounds that he was denied admittance to a State law school because of his color. The action was based on the theory that the State had denied the negro the equal protection of the laws. This Court stated at page 349:

> "By the operation of the laws of Missouri a *privilege* has been created for white law students which is denied to negroes by reason of their race . . . That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up . . ." (Italics ours.)

Truax v. Corrigan, 257 U. S. 312, where this Court in speaking of the "equal protection" clause stated at page 332:

> "The guaranty was aimed at undue favor and individual or class *privilege* on the one hand, and at hostile discrimination or the oppression of inequality on the other." (Italics ours.)

In *Hayes v. Missouri,* 120 U. S. 68, this Court, referring to the same Constitutional provision, stated at page 69:

> "It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the *privileges* conferred and in the liabilities imposed." (Italics ours.)

Respondents have misconceived the theory pleaded in this complaint. Their attempt to repudiate this action on the argument that no right is involved is completely without merit as is shown by the excerpts from *Missouri ex rel Gaines v. Canada, supra.* There the action was brought on the theory that the plaintiff had been denied the equal right to enjoy a *privilege* granted to other citizens of the State. This Court recognized that right as *"the denial of the equality of legal right to the enjoyment of the privilege."* (P. 349.) (Italics ours.)

Petitioner here points again to the facts pleaded in its complaint. No argument is made that there is a right to broadcast from a courtroom. The pleading states that respondent Morrison gave to respondent KVOE the privilege of broadcasting from the courtroom and denied it to petitioner. The crux of the action and the theory of the complaint is that when respondent Morrison denied petitioner the equal enjoyment of that privilege, the legal right of petitioner to equally enjoy the privilege granted to KVOE and KMPC was violated. It is upon this latter violation of petitioner's legal rights that this action is brought.

II.

Reply to Respondents' Proposition That No Federal Question Is Involved. (Resp. Br. pp. 4-5.)

This proposition of respondents is but another approach to the general issue of whether there was a denial of equal protection. The authorities cited are in point only on the obvious rule that if a denial of equal protection is not alleged in the complaint, it is defective under the Civil Rights Act.

Respondents cite two cases in this portion of their brief as authority for the statement that the Civil Rights Statutes do not make Federal questions of every departure from State law. These cases are *Love v. Chandler,* 124 F. 2d 785, and *United States v. Mozley,* 238 U. S. 383, 59 L. Ed. 1355.

In the *Love* case plaintiff sued on a theory of conspiracy to prevent him from having and holding employment under W. P. A. The Court pointed out that plaintiff sought no redress because the *State of Minnesota* discriminated against him or because its laws failed to afford him equal protection. Thus no *State* discrimination invoking the Civil Rights Statute was involved.

United States v. Mozley, 238 U. S. 383, 59 L. Ed 1355, is favorable to respondents in the dissenting opinion only. The majority opinion written by Mr. Justice Holmes holds that a conspiracy of State election officials to omit the returns of certain precincts at an election for members of Congress from their counts and from their return to the State election board is indictable under a Statute making it a crime to conspire or injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by him under the Constitution or laws of the United States.

Unquestionably, the complaint here presents a Federal question within the jurisdiction of the District Court, and was so clearly held in *Bell v. Hood*, 327 U. S. 678. This inquiry is entirely separate from whether a cause of action is stated. In the *Bell* case this Court held at page 681:

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States . . . Where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the Federal Court . . . must entertain the suit . . . the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.
>
> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction . . ."

The complaint here carefully follows the pleading approved in *Westminster School District of Orange County v. Mendez*, 161 F. 2d 774, and the requirements of a proper pleading of a Civil Rights case, as set forth in *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497. Attention is also called to the pleading requirements of a Civil Rights Act case as set out by the United States Court of Appeals for the Second Circuit in *Burt v. City of New York*, 156 F. 2d 791, which case predicates its views on the rules enunciated in the *Snowden* case. It meets the standards laid down in those decisions.

III.

Conclusion.

Petitioner respectfully submits in the language of *Bell v. Hood, supra* (p. 681):

> ". . . the complaint . . . is so drawn as to seek recovery directly under the Constitution and Laws of the United States . . ."

and therefore

> ". . . the Federal Court . . . must entertain the suit . . . the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy."

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EUGENE OVERTON,
EDWARD D. LYMAN,
By EDWARD D. LYMAN,
Attorneys for Petitioner.